

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:	:	
	:	
FRATERNAL ORDER OF POLICE, LODGE 2,	:	
	:	Representation Petition
AND	:	<u>00-04-283</u>
	:	
CITY OF LEWES, DELAWARE.	:	

RE: Lewes Police Department

Appearances

Timothy P. Mullaney, Sr., Esq., for FOP Lodge 2
Tempe Brownell Steen, Esq., Tunnell & Raysor, P.A., for the City of Lewes

The City of Lewes, Delaware (“City”), is a municipality located in Sussex County, Delaware. It is governed by an elected Mayor and City Council, in accordance with its charter (57 Del. Laws 170).

Fraternal Order of Police Lodge 2 (“FOP”), is an employee organization within the meaning of §1602(f)¹ of the Police Officers’ and Firefighters’ Employment Relations Act (“POFERA”), 19 Del.C. Chapter 16.

On April 25, 2000, FOP Lodge 2 filed with the Public Employment Relations Board (“PERB”) a Petition for Bargaining Unit Determination and Certification of Exclusive Bargaining Representative. FOP Lodge 2 seeks to create and represent for

¹ “Employee organization” means any organization which admits to membership police officers or firefighters employed by a public employer and which has as a purpose the representation of such employees in collective bargaining, and includes any person acting as an officer, representative, or agent of said organization.

purposes of collective bargaining a unit of all City of Lewes Police Officers below the rank of Chief.

The City objects to the petition, asserting it is untimely, as the City did not employ 25 full-time employees on the date the petition was filed, nor as of the end of the pay period immediately preceding the filing of the petition.

A hearing was convened on June 23, 2000, at which time the parties were afforded full opportunity to present evidence in support of their positions. The record closed upon receipt of oral argument at the conclusion of the hearing. This decision results from the record created by the parties in this matter.

POSITIONS OF THE PARTIES

FOP Lodge 2:

This petition is properly and timely filed as the City of Lewes did employ 25 full-time employees during the organizational campaign prior to the filing of the petition. The City also has budgeted for 25 full-time employees both in the current and prior fiscal year. The FOP contends there were not 25 full-time employees on the payroll on the date the petition was filed because of normal and customary transitions in the City's work force.

The FOP argues the City Council has initiated no formal action to decrease the number of budgeted positions from 25 in the current fiscal year and suspended filling one vacant position in order to remain below the statutory threshold of 25 full-time employees.

The FOP further asserts that the employees of the Lewes Board of Public Works (“BPW”) should be included in the relevant employee count. The BPW occupies office space in the Town Hall at no cost, BPW employees dispatch police officers for non-emergency calls after regular business hours, and the Mayor sits as an ex-officio member of the BPW.

City of Lewes:

The City asserts it did not meet the standard for coverage by the Police Officers’ and Firefighters’ Employment Relations Act on the date the petition was filed because, at that time, it did not employ 25 or more full-time employees. An “employee”, while not defined by the statute, is commonly understood to mean one who is in the service of another usually for wages or salary. The City asserts it has 23 full-time employees², with one additional position advertised to be filled, and a second position “on-hold” until the City Council Revenue Subcommittee issues its recommendations with respect to the privatization of trash removal.

The City argues the General Assembly chose to define the threshold for coverage in terms of “full-time employees”, rather than budgeted positions. The City acknowledges that its current budget includes 25 full-time positions, but argues that the City’s budget is a management planning document rather than a hiring mandate. The City argues it retains the authority to either fill or not fill budgeted positions. The City’s Personnel Policy Manual defines a position to mean “... a group of duties and

² The City of Lewes Personnel Policies Manual defines a “part-time employee” to mean “an employee, either regular or temporary, who is regularly scheduled less than 35/7 hours per workweek/work day.”

responsibilities, requiring full-time or part-time employment of one person, a position may be vacant or occupied.”

The City disputes the FOP’s assertion that the Lewes Board of Public Works is an agency of the City, which employees should be counted for purposes of meeting the full-time employee threshold. The City contends the BPW is a legally and financially separate entity. BPW revenues are not available to the City and the City does not exercise any control over the operations or management of the BPW. BPW keeps the City Council apprised of its work and plans as a courtesy to the Council.

OPINION

The Police Officers’ and Firefighters’ Employment Relations Act defines a “public employer” to be:

... any municipal corporation, or municipality, city or town located within the State or any agency thereof, which, (1) upon the affirmative legislative act of its common council or other governing body has elected to come within Chapter 13 of this Title, (2) hereafter elects to come within this Chapter or (3) employs 25 or more full-time employees. For purposes of paragraph (3) of this subsection, “employees” shall include each and every person employed by the public employer, except: (a) any person elected by popular vote; and (b) any person appointed to serve on a board or commission. 19 Del.C. §1602(1).

The statute does not define “full-time employee” or “employed” for purposes of applying the 25 full-time employee threshold.

In applying the provisions of the Labor Management Relations Act in Maestro Plastics Corp. (350 US 270 (1956)), the United States Supreme Court cautioned against overly narrow and literal construction of provisions of the labor statute which would produce incongruous results. Similarly, Chancellor Allen provided guidance to the

PERB in interpreting provisions of the Public School Relations Act, whose provisions essentially mirror those of the Police Officers' and Firefighters Relations Act:

... It is, of course, a court's ultimate aim in construing or interpreting a statute to attempt, in the specific setting of a concrete problem, to satisfy the legislative will or purpose as expressed generally in the statutory language. When that will or purpose has been expressed in clear language that clearly applies, there is no occasion for a court to do more than apply the language. If, however, that will or purpose has not been clearly expressed, interpretation in order to deduce it is required. On other occasions, it is reasonably plain that the legislature had no specific intention with respect to a problem that later arises. In that circumstance, the best technique to employ – the one most consistent with the limited judicial role in our democracy – is for the court to interpret the words used, in a manner consistent both with their ordinary usage and with the discernible intent of the statute. Seaford Bd. of Education v. Seaford Education Assn., Del. Chan., C.A. 9491 (2/5/88).

Effective interpretation of statutory provisions and the application to a specific set of circumstances should not be limited to consideration of a single sentence or phrase, but should look to the provisions of the statute as a whole, including its purpose and policy.

The Delaware General Assembly clearly set forth the intended purpose for the Police Officers and Firefighters' Employment Relations Act:

...to promote harmonious and cooperative relationships between public employers and their employees, employed as police officers and firefighters, and to protect the public by assuring the orderly and uninterrupted operations and functions of public safety services. 19 Del.C. §1601.

Section 1601 further provides these policies are “best effectuated” by, in part, “[g]ranting to police officers and firefighters the right of organization and representation,” for purposes of collective bargaining. 19 Del.C. §1601(1). The law is not intended to “penalize” employers by requiring that they bargain collectively with their employees, but rather to foster an environment which promotes and supports harmonious and

cooperative labor/management relationships designed to protect the public by assuring the orderly and uninterrupted operation and function of public safety services.

The POFERA provides support for considering the complement of full-time employees of the municipality for a limited period preceding the filing of the petition. Section 1611(a) provides that cards collected by a labor organization for purposes of supporting a representation petition are valid if signed at any time within the twelve (12) months immediately preceding the filing of the petition. Considering the normal ebb and flow of individual employees joining and leaving an individual entity's employment over a year, it is logical that a similar period should be considered in determining whether a municipal employer meets the statutory 25 full-time employee standard.

The FOP provided documentation which evidenced that the City employed 25 employees, who were receiving health care benefits for the period of at least June 1, 1999, through July 17, 1999. The City of Lewes does not dispute that it employed 25 full-time employees within the twelve (12) months immediately preceding the filing of the petition. As of April 25, 2000 (the filing date this petition), the City employed twelve (12) full-time employees in the Police Department, five (5) full-time employees in the Buildings and Administration Department, and six (6) full time employees with two vacancies (Truck Driver/Laborer) in the Streets Department. An additional vacancy occurred in the Administration Department with the separation of the Accounts Payable/Payroll Clerk on April 28, 2000. This position has been posted and advertised, and the City Manager testified the City is actively seeking to fill this position. One of the two Streets Department vacancies was filled on June 16, 2000. At the time of the

hearing, the City calculated its full-time employee complement at 23, with the clerical position to be filled as soon as possible.

Additionally, a Project Impact Coordinator position appears on the City's salary schedules since at least November 4, 1999. The City does not consider this position in its calculations because this individual does not receive the benefits afforded to other "full-time" City employees. Although the City Manager testified this position is funded through a Federal Emergency Management Agency (FEMA) grant, it is undisputed the employee was interviewed and hired for a two-year period by the Lewes Project Impact Steering Committee, through the City Manager's office. The Project Impact Coordinator position falls organizationally under the City Manager's office and is supervised by the City Manager and the Steering Committee. Like all full-time employees of the City of Lewes, this employee works 35 hours each week and the City issues his/her paycheck. Whether this employee receives City benefits is not determinative of whether this is a full-time position as required by §1602(l).

The statute does not require that only positions fully funded by a public employer's general fund be counted in the 25 full-time employee threshold. Many, if not all, Delaware municipal police forces employ officers whose salaries are funded in whole or in part through state and federal grants. Neither is the term of the appointment a determinative factor, whether it be a "regular" appointment of indefinite duration or a "fixed", "short-term", or "temporary" appointment. For these reasons, the Project Impact Coordinator should be included in any calculation of the total number of full-time employees.

Limiting the point at which full-time employees are counted to the date on which a representation petition is filed is inconsistent with the purposes of the statute. The law does not envision that a group of employees would collect cards and file a petition in one day, but rather considers that cards may be collected over an extended period of time, up to one year prior to the filing of a petition. Accepting the City's argument that the relevant employee count should occur only on the filing date of the petition would permit employers to thwart organizing efforts by its police officers and/or firefighters by reducing its workforce immediately prior to the filing of the petition. The effect of such a workforce reduction or delay in hiring concurrent with the filing of a representation petition would undoubtedly have a chilling effect on statutorily endorsed representation efforts. One cannot reasonably conclude that the General Assembly intended to create a venue for such strategies when crafting the POFERA.

The City's assertion that counting at any time other than the date of filing "penalizes the employer for planning ahead" is unpersuasive. Applying a consistent time frame to the union's effort to gather the requisite showing of support and to assessing whether the employer meets the employee threshold establishes a level playing field, which is a statutory objective.

Having concluded the period for assessing the 25 full-time employee threshold is the one-year period immediately preceding the filing of a representation petition, it is unnecessary to resolve whether the Board of Public Works is an agency of the City of Lewes whose employees should be counted in meeting the threshold. The testimony and documentary evidence in the record, however, clearly define these organizations as separate and distinct financial and political entities. The City and BPW employees are

hired, supervised and compensated by distinct management structures. These organizations do, however, appear to enjoy a high level of cooperation and communication, which one might expect from public organizations which are subject to the political will of a common electorate and which share responsibilities for a common geographic area.

In closing, the parties in this matter are commended for their clear, concise and comprehensive presentation of issues and evidence.

CONCLUSION

The City of Lewes is a public employer within the meaning of 19 Del.C. §1602(1), as it employed 25 or more full-time employees within the one-year period immediately preceding the filing date of the representation petition.

Wherefore, having heard no objection from the City, the appropriate bargaining unit is determined to be “All police officers employed by the City of Lewes below the rank of Chief of Police.” An election will be conducted within thirty days of the date of this decision.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
HEARING OFFICER
DELAWARE PUBLIC EMPLOYMENT RELATIONS BD.

Dated: 1 August 2000